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CASE NO.: 83-5840

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CARL JACKSON,

Petitioner,

vs

THE STATE OF FLORIDA

Respondent.

ON
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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CASE NO.: _____

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CARL JACKSON,

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vs

THE STATE OF FLORIDA

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

QUESTION PRESENTED FOR REVIEW

WHETHER THE FLORIDA SUPREME COURT, WHICH RELIED UPON THE "OUTCOME-DETERMINATIVE" TEST OF UNITED STATES V. DECOSTER, 624 F.2d 196 (D.C. Cir. 1979) AND KNIGHT V. STATE, 394 So.2d 997 (Fla. 1981), APPLIED THE CORRECT STANDARD FOR REVIEW OF PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL?[1]

1/ Those parties to the proceeding in the Florida Supreme Court are included within the caption of the case in this Court. See Rule 28.1(b), Revised Rules of the Supreme Court of the United States.

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REFERENCE TO REPORTS OF OPINIONS DELIVERED BELOW

Petitioner seeks review of the decision of the Florida Supreme Court in Jackson v. State, 437 So.2d 147 (Fla. 1983).

See also Jackson v. State, 359 So.2d 1190 (Fla. 1978), cert. denied, 439 U.S. 1102 (1979).

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Petitioner seeks this Court's review of the decision of the Supreme Court of Florida in Jackson v. State, 437 So.2d 147 (1983), Opinion filed 28 July 1983, rehearing denied 30 September 1983. The Florida Supreme Court's Opinion applies a standard of review of the Petitioner's claim of ineffective assistance of counsel that is in conflict with decisions of the United States Courts of Appeals for the Fifth and Eleventh Circuits. Specifically, the Florida Supreme Court's Opinion is in conflict with that standard of review enunciated in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B) (en banc), cert. granted, _____ U.S. _____, 103 S.Ct. 2451, 75 L.Ed. 2d _____ (1983); as noted, this Court has recently granted certiorari jurisdiction in the Washington case to address this issue. Accordingly, the Petitioner requests that this Court grant certiorari jurisdiction in the instant case to determine, in conjunction with the Washington case, the appropriate standard of review for ineffective assistance of counsel claims.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

This case involves the Petitioner's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence.

STATEMENT OF THE CASE AND OF THE FACTS

In September of 1975, the Petitioner was convicted of two counts of murder in the first degree, robbery and kidnapping after a trial by jury in the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida. The Defendant was represented by an Assistant Public Defender during trial and on appeal to the Florida Supreme Court. That Court affirmed the Petitioner's convictions on all counts in Jackson v. State, 359 So.2d 1190 (Fla. 1978), cert. denied, 439 U.S. 1102 (1979). See Exhibit 1, APPENDIX.

The Petitioner subsequently filed a motion for post-conviction release before the trial Court pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. See Exhibits 2-4, APPENDIX. Petitioner alleged that his appointed attorneys had rendered ineffective assistance of counsel throughout the course of Petitioner's trial, sentencing and initial appeal to the Florida Supreme Court. See Exhibit 3, APPENDIX (entitled AMENDMENT TO MOTION FOR POST-CONVICTION RELIEF), and Exhibit 4 (entitled SECOND AMENDMENT TO DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF). After a hearing on the matter, the trial Court denied the Petitioner's motion. See Exhibits 5 and 6, APPENDIX.

JACKSON appealed to the Florida Supreme Court but received no relief from that tribunal on his claim of ineffective assistance of counsel. In Jackson v. State, 437 So.2d 147 (Fla. 1983), the Florida Supreme Court relied upon the standard for review of claims of ineffective assistance of counsel articulated in Knight v. State, 394 So.2d 997 (Fla. 1981) to affirm the trial Court's denial of the Petitioner's post-conviction Motion. See Exhibit 7, APPENDIX. The Court found that, while the Petitioner had sufficiently detailed those omissions or overt acts upon which he claimed ineffective assistance of counsel, "he failed to show that most of the

admissions were serious deficiencies beyond what would be expected of competent counsel." 437 So.2d at 149. The Court continued:

> His expert witness' testimony that defense counsel's pre-trial discovery and motions were inadequate was countered by that of appellee's expert witness who stated that the representation provided was 'reasonably effective.' The trial court agreed with appellee's witness and nothing in the record compels us to disturb that result.
>
> The lack of objection to the labeling of the fingerprint also fails to convince us that counsel was ineffective. Even if we agreed that such was measurably below what is expected of competent attorneys, it certainly did not so prejudice appellant that he might otherwise not have been found guilty, since it was not disputed that his fingerprint was found at the scene.
>
> The remainder of the alleged shortcomings may be dismissed in a similar manner. The 'failure to investigate and present a defense' and to request instructions on the effect of a jury recommendation of mercy do not fall measurably below the standard expected of competent counsel. Although appellant is obviously dissatisfied with the result of the defense that was presented, we will not use the perfect vision of hindsight and label that defense incompetent. It was, under the circumstances, a reasonable strategy.
>
> Defense counsel's voir dire examination regarding pretrial publicity, racial bias, and imposition of the death penalty was not so lacking as to be considered incompetent. If it was deficient at all, it was not substantial enough to demonstrate a prejudice to appellant so severe that it affected the outcome of the proceedings. The record shows that appellant's guilt was clearly and convincingly demonstrated by more than adequate evidence. Any shortcomings in voir dire were not the conclusive and decisive factors in his conviction.
>
> As the trial court noted in denying appellant's rule 3.850 motion, a 'textbook defense' is not the requirement here. The trial court heard the arguments in the 3.850 hearing, considered the expert testimony presented by both sides, and determined that the respresentation afforded appellant was adequate. None of the arguments raised convince us that said

decision was unsubstantiated or incorrect, and so the trial court's decision is affirmed.

Id. at 149-50.

JACKSON sought rehearing before the Supreme Court of Florida, arguing that the recent decision of Weidner v. Wainwright, 708 F.2d 614 (11th Cir. 1983) required reconsideration of whether Petitioner's trial counsel had adequately investigated and presented a defense. See Exhibit 8, APPENDIX. Petitioner recited trial counsel's failure in the instant case to adequately conduct discovery and investigate and prepare in anticipation of trial. Such ineffective assistance, Petitioner argued, "falls well below the standard of effective assistance of counsel as applied in Weidner." See Exhibit 8, APPENDIX, at p. 4.

The Florida Supreme Court denied rehearing, without opinion, on 30 September 1983. See Exhibit 9, APPENDIX. Mandate was issued by that Court on 1 November 1983. See Exhibit 10, APPENDIX.

ARGUMENT

THE FLORIDA SUPREME COURT, WHICH RELIED UPON THE "OUTCOME-DETERMINATIVE" TEST OF UNITED STATES V. DECOSTER, 624 F.2d 196 (D.C. Cir. 1979) AND KNIGHT V. STATE, 394 So.2d 997 (Fla. 1981), APPLIED THE INCORRECT STANDARD FOR REVIEW OF PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner argued before the Florida Supreme Court that it should apply the standards of review articulated in Weidner v. Wainwright, 708 F.2d 614 (11th Cir. 1983) to his claim of ineffective assistance of counsel. The facts of the Weidner case are analogous to those of the instant case; however, the Weidner court, applying the standard of review for ineffective assistance of counsel claims articulated in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B) (en banc),

cert. granted, _____ U.S. _____ 103 S.Ct. 2451, 75 L.Ed. 2d _____ (1983) found that Weidner's trial counsel had been ineffective.

The Eleventh Circuit Court of Appeals concluded in Washington v. Strickland that in order to be successful on a claim of ineffective assistance of counsel, a petitioner must demonstrate both a denial of effective assistance of counsel and a showing of actual and substantial prejudice. If this burden is met by a petitioner, the burden shifts to the State to prove that trial counsel's ineffectiveness was harmless beyond a reasonable doubt. 693 F.2d at 1258. This standard of review is substantially different from the Knight v. State standard applied by the Florida Supreme Court in the instant case. As noted by the Jackson Court, Knight v. State, 394 So. 2d 997 (Fla. 1981) established a four-part test which requires:

> 'First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.
>
> Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel. As was explained by Judge Leventhal in DeCoster III [United States v. DeCoster, 624 F.2d 196 (D.C.Cir. 1979)]: "To be 'below average' is not enough, for that is self evidently the case half the time. The standard of shortfall is necessarily subjective, but it cannot be established merely by showing that counsel's acts or omissions deviated from a checklist of standards." 624 F.2d at 215. We recognize that in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances.
>
> Third, the defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings. In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error. This requirement that a

> defendant has the burden to show prejudice is the rule in the majority of other jurisdictions.
>
> Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the state still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact. This opportunity to rebut applies even if a constitutional violation has been established.'

437 So.2d at 149 (quoting Knight v. State, 394 So.2d at 1001 (footnote omitted)).

The Knight v. State standard is perhaps best described as the "outcome-determinative" standard of United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1979) (en banc) (DeCoster III). That test requires a petitioner to carry a burden of showing prejudice that is effectively insurmountable, insofar as a petitioner must demonstrate that the outcome of a proceeding, either in terms of a finding of guilt or innocence or in the determination whether the death penalty should be applied, has been affected by trial counsel's ineffectiveness. Noting that this burden is more substantial than the "cause and prejudice" formulation of Wainwright v. Sykes, 433 U.S. 72 (1977), the Eleventh Circuit reasoned in Washington v. Strickland:

> Application of the DeCoster rule may thus have the surprising result of holding a petitioner who has established a deprivation of his constitutional right to effective assistance of counsel to a greater showing of prejudice than if he was merely trying to present a claim of constitutional error not raised in the state courts.

693 F.2d at 1261 (emphasis in original) (footnote omitted).

The Eleventh Circuit expressly rejected the outcome-determinative test of DeCoster and Knight. 693 F.2d at 1261. Petitioner respectfully submits that, if the Washington v. Strickland standard of review were applied to the facts of the instant case, those facts, similar to Weidner v. Wainwright, clearly support actual and substantial prejudice sufficient for

reversal of the Petitioner's convictions and remand for a new trial.

This Court has not previously articulated the appropriate standard of review for ineffective assistance of counsel claims. That issue is presently before the Court in Washington v. Strickland. Oral argument on the matter is scheduled for 10 January 1984. Accordingly, CARL JACKSON requests that this Court grant jurisdiction in this cause to consider CARL JACKSON's Petition in conjunction with Washington v. Strickland and requests that the Court remand this cause to the Florida Supreme Court for reconsideration under the standard of review articulated by the United States Court of Appeals in that proceeding.

CONCLUSION

WHEREFORE, Petitioner CARL JACKSON respectfully prays that this Court issue a Writ of Certiorari to review the decision of the Supreme Court of Florida in this death penalty case.

Respectfully submitted,

LARRY G. TURNER
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904/375-4460
Counsel of Record

Office - Supreme Court, U.S.
FILED
NOV 29 1983
ALEXANDER L. STEVAS
CLERK

83-5840

CASE NO.: _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CARL JACKSON,

Petitioner,

vs

THE STATE OF FLORIDA

Respondent.

ON
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITIONER'S MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

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COUNSEL FOR PETITIONER

PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS AND AFFIDAVIT IN SUPPORT THEREOF

The Petitioner, CARL JACKSON, respectfully moves this Court for leave to proceed in forma pauperis in the above-styled proceeding, and as grounds therefor states:

1. The Petitioner has filed with this Motion his PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA and APPENDIX thereto.

2. The facts showing that the Petitioner comes within the requirement to proceed in forma pauperis are presented in the PETITIONER'S AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS, which is attached hereto as Exhibit 1.

3. The Petitioner was charged and convicted of the offense of murder in the first degree (two counts) and other offenses and sentenced to death in Bay County, Florida in 1975. The Defendant was determined to be indigent at that time and was represented by the Public Defender. The Public Defender also represented the Defendant after conviction on appeal to the Florida Supreme Court.

4. The Defendant has been incarcerated at Florida State Prison since the date of conviction and continues to be without financial resources. The LAW OFFICES OF LARRY G. TURNER, P.A. and the LAW OFFICES OF WILLIAM B. SALMON have represented the Defendant before the trial Court in post-conviction proceedings without fee or expenses. The same law offices were appointed as appellate counsel to represent the Defendant in his appeal from the denial of his post-conviction motion. See Exhibit 2.

WHEREFORE, Petitioner CARL Jackson respectfully moves the Court for leave to proceed in forma pauperis in this certiorari proceeding.

Respectfully submitted,

LARRY G. TURNER
Post Office Box 508
Gainesville, Florida 32602
904/375-4460
Counsel of Record

STATEMENT OF MAILING

The undersigned, LARRY G. TURNER, having been duly sworn, deposes and states that he is a member of the Bar of the United States Supreme Court, and that PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS AND AFFIDAVIT IN SUPPORT THEREOF has, pursuant to Rule 28.2, Revised Rules of the Supreme Court of the United States, been deposited in a United States Post Office or mailbox in Gainesville, Florida, with first-class postage prepaid, properly addressed to the Clerk of the United States Supreme Court, within the time allowed for filing, and that to my knowledge the mailing took place on 29 November 1983.

LARRY G. TURNER

SWORN TO AND SUBSCRIBED before me this 29th day of November, 1983.

NOTARY PUBLIC

My Commission Expires:
Notary Public, State Of Florida At Large
My Commission Expires June 9, 1986

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION TO PROCEED IN FORMA PAUPERIS AND AFFIDAVIT IN SUPPORT THEREOF has been served upon David P. Gauldin, Assistant Attorney General, Department of Legal Affairs, The Capitol, 1502, Tallahassee, Florida 32301 by depositing said document in a United States Post Office or mailbox with first-class postage prepaid, this 29th day of November 1983.

LARRY G. TURNER
Post Office Box 508
Gainesville, Florida 32602
904/375-4460
Counsel of Record

UNITED STATES SUPREME COURT

OCTOBER 1983 TERM

CARL JACKSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

CASE NO. _____

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, CARL JACKSON, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on petition for writ of certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, and that I believe I am entitled to redress.

I further swear that the following information relating to my ability to pay the costs of prosecuting the petition for writ of certiorari are true:

1. I am not presently employed. I have been incarcerated since 1975.

2. I have not received, within the past twelve months, any income, whether from a business, profession or other form of self-employment or in the form of rental payments, interest, dividends or any other source.

3. I do not own any cash or checking or savings accounts.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

I understand that a false statement in this affidavit will

EXHIBIT 1

subject me to penalties for perjury.

CARL JACKSON

SUBSCRIBED AND SWORN TO BEFORE ME THIS 25th DAY OF

November, 1983.

Notary Public

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXPIRES
BONDED THRU GENERAL

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR BAY COUNTY.

STATE OF FLORIDA,

Plaintiff

CASE NO. 75-258 CF

vs.

CARL JACKSON, [illegible]

Defendant.

O R D E R

On Motion of the Defendant, concurred in by Larry G. Turner and Bill Salmon, Attorneys, it is,

ORDERED and ADJUDGED that LARRY G. TURNER and BILL SALMON, Attorneys at Law, Gainesville, Florida are hereby appointed as appellate counsel to represent the Defendant in his appeal from a denial of his motion under Rule 3.850, RCrP, dated 31 December, 1980. The Attorneys have agreed, by telephone, to serve without compensation provided the State of Florida furnish, at no costs to the Defendant, a transcript of the hearing on the Rule 3.850 Motion, which condition was agreed to by the State Attorney, Fourteenth Judicial Circuit this date.

ORDERED at Panama City, Bay County, Florida, this 27th day of March, 1981.

W. Fred Turner

W. FRED TURNER, CIRCUIT JUDGE

Copies: State Attorney
Fourteenth Judicial Circuit

Hon. Larry G. Turner

Hon. Bill Salmon

Attorney General
State of Florida

EXHIBIT 2

83-5840

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FILED
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CLERK

CASE NO.: _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CARL JACKSON,

Petitioner,

vs

THE STATE OF FLORIDA

Respondent.

ON
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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COUNSEL FOR PETITIONER

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3	AMENDMENT TO MOTION FOR POSTCONVICTION RELIEF
4	SECOND AMENDMENT TO DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF
5	ORDER
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9	ORDER DENYING MOTION FOR REHEARING
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	STATEMENT OF MAILING
	CERTIFICATE OF SERVICE

CD 439 US 1102 (79)

Carl JACKSON, Appellant,

v.

STATE of Florida, Appellee.

No. 48165.

Supreme Court of Florida.

March 9, 1978.

Rehearing Denied July 13, 1978.

Defendant was convicted by a jury in the Circuit Court, Bay County, Mercer P. Spear, J., of robbery, kidnapping, and two counts of first-degree murder and was sentenced to death. Defendant appealed. The Supreme Court held that: (1) trial court did not abuse its discretion in denying defendant's motion for change of venue; (2) death penalty statute is constitutional; (3) three photographs of victims were admissible, even though gruesome, inasmuch as such photographs were relevant; (4) sheriff's statement on cross-examination by defense counsel that defendant had stated that he wanted a lawyer after he was advised of his *Miranda* rights and was warned that he was going to be asked questions regarding two murdered women was admissible; (5) defendant by voluntary seeking out law enforcement officer to make a statement after being fully advised of his rights on two occasions thereby waived protection afforded by *Miranda* with result that such statement was admissible, and (6) where there was a doubling up of aggravating circumstances but no mitigating circumstances, death sentence was upheld.

Judgment affirmed and death sentence upheld.

Hatchett, J., concurred specially with an opinion.

Boyd, J., concurred in part and dissented in part with an opinion.

1. Criminal Law ⇐126(1)

Test for determining change of venue is whether general state of mind of inhabitants of community is so infected by knowledge of incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try case solely upon evidence presented in courtroom.

2. Criminal Law ⇐126(2)

Where, in prosecution for two counts of first-degree murder, prospective jurors, when questioned, stated that they could decide issues between State and defendant based upon evidence heard and exhibits examined in courtroom, trial judge did not abuse his discretion in denying defendant's motion for change of venue, even though 22 of the prospective jurors examined admitted to having read about case or having heard about it on radio or television and nine prospective jurors knew one of victims or knew one or more of witnesses who would testify at trial.

3. Criminal Law ⇐1213

Death penalty statute is not unconstitutional. West's F.S.A. § 921.141.

4. Criminal Law ⇐438(1)

Fact that photographs are offensive to senses and might tend to inflame jury is insufficient by itself to constitute reversible error, but admission of such photographs must have some relevancy, either independently or as corroborative of other evidence.

5. Criminal Law ⇐438(7)

In prosecution for two counts of first-degree murder, three photographs of victims were admissible, even though gruesome, inasmuch as such photographs were relevant.

6. Criminal Law ⇐1169.1(10)

Gory and gruesome photographs admitted primarily to inflame jury will result in a reversal of conviction.

7. Criminal Law ⇐1171.5

Any comment upon a defendant's standing moot or silent or refusing to testify in face of an accusation is fundamental error requiring reversal for a new trial. U.S.C.A.Const. Amends. 5, 6.

8. Criminal Law ⇐1137(5)

Sheriff's statement on cross-examination by defense counsel that defendant had stated that he wanted a lawyer after being

EXHIBIT 1

advised of his *Miranda* rights and warned that he was going to be asked questions regarding two murdered women was properly admitted, even though defendant contended that sheriff's statement was impermissible comment upon defendant's exercise of his *Miranda* rights, inasmuch as but for insistence of defendant himself, fact would not have come before jury. U.S.C.A.Const. Amends. 5, 6.

9. Criminal Law ⇐1127(2)

A defendant cannot initiate error and then seek reversal based on that error.

10. Criminal Law ⇐412.2(5)

Defendant by voluntarily seeking law enforcement officer to make a statement, after being fully advised of his rights on two occasions, thereby waived protection afforded by *Miranda* with result that such statement was admissible, given fact that prior interrogation by police ceased once defendant requested an attorney and fact that defendant's decision to have an attorney was not irrevocable. U.S.C.A.Const. Amends. 5, 6.

11. Homicide ⇐354

Where, in prosecution for two counts of first-degree murder arising out of robbery and kidnapping, trial court in written findings upon which death sentence was based doubled up aggravating circumstances by considering as a separate aggravating circumstance fact that murder of one victim was committed for pecuniary gain while defendant was engaged in commission of robbery but there were no mitigating circumstances, death sentence was upheld. West's F.S.A. §§ 921.141(5), (5)(d, f), (6).

Louis G. Carres, Asst. Public Defender, Tallahassee, for appellant.

Robert L. Shevin, Atty. Gen., and Richard W. Prospect, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

Appellant, Carl Jackson, was convicted on two counts of murder in the first degree.[1] The jury recommended and the trial judge imposed a sentence of death. Jurisdiction vests in this court pursuant to Article V, Section 3(b)(1), Florida Constitution. We affirm the conviction and sentence.

On Sunday morning, April 20, 1975, Ann Patterson Butler was found shot in the head behind the counter of the Jr. Food Store in Bay County, Florida. A short time later, the corpse of Mary Frances Price was found in the front seat of a Chrysler automobile parked in a cemetery a short distance away. There were no witnesses to the actual killings. The following facts were adduced at trial:

On the morning of April 20, 1975, Jimmy Harris, an acquaintance of Jackson's, stopped by appellant's apartment to collect a debt. Appellant asked Harris to drive him to a friend's house to pick up the money. Instead of directing Harris to the other person's house, however, Jackson, with a gun in his belt, told Harris to stop at a Jr. Food Store. He then got out of the car and ordered Harris to drive around the block, return, and pick him up. Harris drove away but did not return. Later that day, after hearing that the Jr. Food Store had been robbed, Harris went to the police and related the above information concerning appellant's earlier activities.

That same morning, Mr. and Mrs. Price stopped at the Jr. Food Store on their way to church. Mrs. Price waited in the car while Mr. Price went into the store. The keys to the car remained in the ignition. When Mr. Price entered the store, he turned left, away from the counter, and walked to the far corner of the building. After finding the item he wished to purchase, he approached the counter where he found Mrs. Butler, the sales clerk, lying on the floor in a pool of blood. He immediately telephoned the police and then looked out the front door and discovered that his wife and his car were missing. Both were found in a cemetery a few blocks away from the Jr. Food Store. Mrs. Price had been shot in the head at close range.

During the course of the investigation, appellant's jacket was discovered in the woods a few feet from the abandoned car.

1. Appellant was also convicted of robbery and kidnapping for which he received the following sentences: life imprisonment on the robbery charge and 15 years on the kidnapping charge.

His girlfriend testified that he was wearing the jacket when he left their apartment on Sunday morning and returned later that day without it. Another witness testified that shortly after the robbery had taken place he saw appellant in the vicinity walking along the road and stopped to offer him a ride. Once inside the vehicle, appellant asked the witness if he had heard about the murder in the cemetery. Mrs. Price had not at this time been found. In addition, appellant's fingerprints were found on a package of cigarettes in the front seat of the Prices' car.

The evidence against appellant, though circumstantial, was strong.

[1, 2] Appellant raises five points on appeal. First, he argues that the trial court erred in denying his motion for change of venue. It is his contention that, due to pretrial publicity, it was impossible for him to receive a fair and impartial trial in Bay County. Twenty-two of the prospective jurors examined admitted to having read about the case or having heard about it on the radio or television. Nine prospective jurors knew one of the victims or knew one or more of the witnesses who would testify at trial. This issue is governed by the test stated in *Kelley v. State*, 212 So.2d 27 (Fla.2d DCA 1968), which we adopted in *McCaskill v. State*, 344 So.2d 1276, Opinion filed April 7, 1977:

> Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom. *Singer v. State* (Fla.1969) 109 So.2d 7; *Collins v. State* (Fla.App.1967) 197 So.2d 574, and cases cited therein. *Kelley v. State*, 212 So.2d at 28.

The prospective jurors, when questioned, stated that they could decide the issues between the state and the appellant based upon the evidence heard and the exhibits examined in the courtroom. We find nothing in the record to indicate that the trial judge abused his discretion in denying appellant's motion for change of venue.

[3] In appellant's second point he attacks the constitutionality of Florida's death penalty. Similar attacks were rejected by this court in *State v. Dixon*, 283 So.2d 1 (Fla.1973), and by the United States Supreme Court in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). These cases are dispositive of this issue.

[4-6] Appellant's third point involves the admission into evidence of three photographs taken of the victims and admitted over appellant's objections. It is appellant's contention that these pictures were unnecessary and served only to inflame the passions of the jury. Indeed, the pictures complained of are gruesome. However, as we stated in *Young v. State*, 234 So.2d 341 (Fla.1970):

> The fact that the photographs are offensive to our senses and might tend to inflame the jury is insufficient by itself to constitute reversible error, but the admission of such photographs must have some relevancy, either independently or as corroborative of other evidence. (footnotes omitted)

And again, in *State v. Wright*, 265 So.2d 361 (Fla.1972):

> [T]he current position of this Court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in a case. Relevancy is to be determined in the normal manner, that is, without regard to any special characterization of the proffered evidence. Under this conception, the issues of "whether cumulative", or "whether photographed away from the scene," are routine issues basic to a determination of relevancy, and not issues arising from any "exceptional nature" of the proffered evidence.

See also *Bauldree v. State*, 284 So.2d 196 (Fla.1973), and *Swan v. State*, 322 So.2d 485 (Fla.1975). Applying this test of admissibility to this case, we hold that the photographs were relevant and that no error was committed in admitting them into evidence. However, we again caution the prosecutors of this state that gory and gruesome photographs admitted primarily to inflame the

jury will result in a reversal of the conviction.

[7-9] Appellant also challenges the admission of certain statements elicited at trial regarding the exercise of his *Miranda* rights. The Bay County Sheriff was sworn as a witness for the state and related the following facts: Upon arrest, appellant was advised of his constitutional rights pursuant to the procedure outlined in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), after which he discussed his whereabouts on the morning of the murders and described the clothing he was wearing on that date. The sheriff then warned Jackson that he was going to ask him questions regarding the two women who were murdered, whereupon the defendant stated, "I want a lawyer." It is appellant's contention that the sheriff's statement constitutes an impermissible comment upon appellant's exercise of his rights under the Fifth and Sixth Amendments to the United States Constitution. Appellant correctly states our holding in *Bennett v. State*, 316 So.2d 41 (Fla.1975), that any comment upon a defendant's standing mute or silent or refusing to testify in the face of an accusation is fundamental error requiring reversal for a new trial. But this is not a *Bennett* situation. In *Bennett* the *prosecutor* elicited testimony from his own witness to the effect that after being advised of his constitutional rights, defendant "refused to sign the waiver . . ." This statement suggests that defendant had a duty to respond and was held to be an impermissible comment on defendant's exercise of his Fifth Amendment rights. In the present case, the appellant's statement, "I want a lawyer" was brought out on cross-examination by counsel for the defense.[2] But for the insistence of appellant

2. Q All right, Sheriff, at this point did you show the defendant, this defendant, Carl Jackson, this is the defendant that you were talking to, right here? (Indicating.)
A Yes, sir.
Q Did you show Carl Jackson anything?
A Yes, sir.
Q All right, I show you State's Exhibit Number One for identification and ask you if you can identify that?
A Yes, sir, this is a brown jacket which I took out of a bag and handed it toward Carl Jackson, and he said—I said, "Is this your jacket?" And he said, "That's my jacket."
Q If the Court please, we move to introduce the jacket as State's Exhibit Number One for identification into evidence.
THE COURT: Do you desire to cross examine the witness?
MRS. COSTELLO: One moment, Your Honor.
THE COURT: Well, the Court will withhold ruling until the defendant has had the opportunity to cross examine the witness.
MR. JONES: You may inquire.
CROSS EXAMINATION BY MRS. COSTELLO:
Q How do you know this is the jacket that you showed Carl Jackson?
THE WITNESS:
A I initialed it, and the date, right here. Here are my initials and the date. (Indicating.)
Q Okay, and you put those on at that time?
A Yes, Ma'am.
Q Mr. Jackson said that was his jacket?
A Yes, Ma'am.
Q He had previously denied having a jacket, is that correct?
A Yes.
Q That was not in question and answer form, was it?
A Repeat that, please, Ma'am.
Q Sheriff, you just read the statement to the jury you say you took from Mr. Jackson. They were in question and answer form, is that correct?
A Yes.
Q And in that statement Mr. Jackson denied having a jacket, is that correct?
A There's two situations. He said he was wearing a jacket on one question in this statement, and then another one he said he wasn't wearing a jacket.
Q All right. Why wasn't this oral statement taken down and recorded by the stenographer?
A It was.
Q Not in question and answer form, was it?
A This—
Q The part where you say he admits that's his jacket, that particular jacket?
A I see what you're getting at. When I asked—he answered the question, "Why are you trying to say something?" And the question, it wasn't really a question, it was a statement, "I want to talk to you about those two women that were murdered."
Q At that point, that was the period where the stenographer stopped taking down questions and answers in that form, is that correct?
A Right. I reached down, there was a bag sitting at my feet, between Mr. Jackson and myself. I reached down and pulled this jacket out of the bag and handed it toward him, unfolded it, and said, "Is this your jacket?"
Q I understand that was your statement.

himself, the fact would not have come before the jury. Appellant cannot initiate error and then seek reversal based on that error. *Gagnon v. State*, 212 So.2d 337 (Fla.3d DCA 1968); *Borst v. Gale*, 99 Fla. 376, 126 So. 290 (1930).

[10] Later that evening, after appellant had informed the sheriff that he wished to speak to a lawyer, but before a lawyer was summoned, appellant asked to speak to the chief investigator concerning the charges against him. At this time, appellant was again advised of his rights, whereupon he proceeded to make a statement. Although appellant denied any involvement in the murders for which he was later tried, the substance of the statement was damaging because it was inconsistent with prior statements. Appellant contends that the trial court erred in admitting the statement into evidence. We find no authority to uphold his position. There is nothing in the record to indicate that the interrogation by the sheriff did not cease once appellant requested an attorney. The decision to have a lawyer is not irrevocable. If the evidence shows, as it does in this case, that a defendant voluntarily seeks out a law enforcement officer to make a statement, after being fully advised of his rights on two occasions, he may do so, thereby waiving the protection afforded by *Miranda*. See *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), wherein the United States Supreme Court held that a statement given by defendant to an investigating officer was admissible even though the defendant had asserted his right to remain silent during an earlier interrogation that same day.

Having determined that no reversible error has been made to appear which would require a new trial, we proceed to examine the sentence imposed.

[11] In the trial court's written findings,[3] upon which the sentence of death was based, the Court considered as a separate aggravating circumstance the fact that the murder of Mrs. Butler was committed for

MR. JONES: Let the sheriff finish his explanation.

MRS. COSTELLO: I don't think he's responding to the question.

THE COURT: Go ahead and proceed.

THE WITNESS:

A What do you want me to do now?

(Laughter.)

THE COURT: Ladies and gentlemen, we are very happy to have all of you here in court. This is your court. You have a perfect legal right to be here. We want you here to see your court in operation. A man is on trial for his life here today. This is a very serious matter. There's nothing funny about it. Now, this is several times that we've had to have order in the courtroom. We do not wish to clear the courtroom. We wish to have you here so that you may see your court in operation. But, you must realize this. You must conduct yourselves accordingly. You may proceed.

MRS. COSTELLO: Thank you, Your Honor. Sheriff, I would just like for you to explain why the form that you had previously followed, asking questions and receiving responses that were recorded by the stenographer, why that was stopped.

THE WITNESS:

A The statement says—

Q Sheriff, I don't think—

THE COURT: Let him finish his answer.

THE WITNESS:

A I'm just reading the statement. The statement says—the suspect, at this point, said he didn't know anything about what we were talking about. At this point I pulled the jacket out. I said—at this point I pulled out a tan jacket from the bag and unfolded it and asked if that was his jacket. The suspect said it was, and I asked him where he left it and he said that he left it in the car. At this point, he said, "I want a lawyer."

3. The Court finds, from the evidence, that sufficient aggravating circumstances exist as enumerated in Subsection (5) of Section 921.141, Florida Statutes, that justify a sentence of death, and that there are insufficient mitigating circumstances, as enumerated in Subsection (6) of said Section 921.141, to outweigh the aggravation circumstances. The aggravating circumstances found by the Court are as follows:

1. The murder of ANN PATTERSON BUTLER was committed while the Defendant was engaged in commission of a robbery.

2. The murder of ANN PATTERSON BUTLER was committed for pecuniary gain.

3. The murder of MARY FRANCES PRICE was committed while the Defendant was engaged in flight after committing a robbery.

4. The murder of MARY FRANCES PRICE was committed while the Defendant was engaged in the commission of the crime of kidnapping.

5. It is the Court's opinion, from the evidence, that both of the aforesaid capital felonies were committed for the additional purpose of avoiding a lawful arrest.

pecuniary gain [Section 921.141(5)(f), Florida Statutes (1973)] while appellant was engaged in the commission of a robbery [Section 921.141(5)(d), Florida Statutes (1973)]. We have held that this procedure constitutes error, at least where mitigating circumstances are present. *Provence v. State*, 337 So.2d 783 (Fla.1976). Where there is a doubling up of aggravating circumstances, but no mitigating circumstances, as is the case here, a sentence of death may be upheld. *Elledge v. State*, 346 So.2d 998 (Fla. 1977).

Accordingly, the judgment is affirmed and the sentence of death upheld.

It is so ordered.

OVERTON, C. J., and ADKINS, ENGLAND, SUNDBERG and KARL, JJ., concur.

HATCHETT, J., concurs specially with an opinion.

BOYD, J., concurs in part and dissents in part with an opinion.

HATCHETT, Justice, concurring specially.

In *Spenkelink v. State*, 350 So.2d 85 (Fla. 1977), I expressed by belief that Section 921.141, Florida Statutes (1973), is unconstitutional on its face and as applied. Both the United States Supreme Court and this Court have held otherwise. I see no purpose to be served by reiterating my views in future cases where the death penalty is imposed.

BOYD, Justice, concurring in part, dissenting in part.

I concur in affirmance of the judgment of guilt. I dissent to upholding the sentence because of the improper doubling of the aggravating circumstances. *Provence v. State*, 337 So.2d 783 (Fla.1976).

In a case where the stakes, life or death, are so great, I cannot treat that mistake as lightly as does the majority. I do not read *Elledge v. State*, 346 So.2d 998 (Fla.1977), to hold otherwise. The existence of unknown mitigating circumstances in *Elledge* and the finding of none by the trial judge here is not a sufficient basis, to my mind, for not applying the *Elledge* reasoning. The following, from *Elledge*, summarizes my view,

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case for a new sentencing trial at which the [impermissible factor] will not be considered. *Elledge*, at 1002.

I would vacate the sentence of death and remand for a new sentencing proceeding.

In re Petition of POST-NEWSWEEK STATIONS, FLORIDA, INC., for change in code of judicial conduct.

No. 46835.

Supreme Court of Florida.

July 5, 1978.

On consideration of the Motion for Rehearing [of Fla.App., 358 So.2d 1360] and Alternative Motion for Expedited Proceedings filed by Petitioner, POST-NEWSWEEK STATIONS, FLORIDA, INC., and the Petition for Rehearing filed by SUNBEAM TELEVISION CORPORATION,

IT IS ORDERED by the Court that said Motion and Petition be and the same are hereby denied.

ENGLAND, C. J., and OVERTON, HATCHETT and ALDERMAN, JJ., concur.

SUNDBERG, J., concurs specially with an opinion with which ENGLAND, C. J., concurs.

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT, IN AND FOR PANAMA CITY, BAY COUNTY, FLORIDA.

STATE OF FLORIDA,

Plaintiff,

CASE NO: 75-258-CF

vs.

CARL JACKSON,

Defendant.

MOTION FOR POST CONVICTION RELIEF

COMES NOW the Defendant, CARL JACKSON, by and through his undersigned attorney and respectfully requests this Court to enter its Order granting the Post-Conviction Relief sought herein. The Defendant would show that:

1. The Judgments sought to be reviewed herein are convictions for the crimes of: Robbery, Count I, Sentence - Life in Prison; Murder in the First Degree, Count II, Ann Patterson Butler (victim), sentence - death; Kidnapping, Count III, Mary Frances Price (victim), sentence - fifteen years; Murder in the First Degree, Count IV, Mary Frances Price (victim), sentence - death.

2. The above-mentioned sentences were imposed by the Honorable Mercer P. Spear, Circuit Judge of the Fourteenth Judicial Circuit of the State of Florida in and for Panama City, Bay County, Florida.

3. That there was an appeal taken to the Supreme Court of Florida wherein the convictions and sentences were upheld. Petition to the Supreme Court of the United States for certiorari was denied.

4. There has been no previous motion for post-conviction relief filed in this cause.

As grounds for the relief sought, the Defendant would show:

A. Ground I - That the Defendant, convicted and sentenced for above-mentioned crimes, was denied his right to due process

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and right to counsel as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Supporting facts: The Defendant, upon his arrest after having spoken briefly with arresting officers exercised his constitutional rights by requesting the presence of a lawyer. Lawyers from the Public Defender's Office for the Fourteenth Judicial Circuit arrived at the Bay County jail and requested and demanded access to the Defendant to speak with their client. The request and demand of the Public Defenders to see and speak with the Defendant were denied by arresting officers and the Bay County Sheriff's Department. The Defendant was denied access to his constitutionally guaranteed attorney until approximately 11 hours after the Defendant requested an attorney. The booking officer for the Bay County Sheriff's Office failed to inform the Defendant that if he was unable to retain a lawyer, one would be immediately provided at no charge and further failed to immediately and effectively place the Defendant in communication with the Office of the Public Defender for the Fourteenth Judicial Circuit. Further denied the Public Defender for the Fourteenth Judicial Circuit access to the Defendant in violation of Rule 3.111, Florida Rules of Criminal Procedure.

B. Ground II - That the trial court's denial of the Defendant's Motion for Change of Venue was an error by the trial court, extremely harmful and prejudicial to the Defendant in violation of his constitutionally guaranteed rights under the Fifth, Sixth and Fourteenth Amendment to the United States Constitution.

Supporting facts: Counsel for Defendant presented the Defendant's Motion for Change of Venue and supporting Affidavits from all but one county of the Fourteenth Judicial Circuit, verifying the inability of the Defendant to receive a fair trial within the Fourteenth Judicial Circuit. This cause was accompanied by massive and prejudicial pre-trial publicity in that:

(1) A massive and widespread manhunt was conducted for suspects in this cause by agents from the Bay County Sheriff's Department, Panama City Police Department, Florida Game and Fresh Water Fish Commission, Marine Patrol, Agricultural Department, and other such official departments as well as citizen groups organized to assist in said manhunt.

(2) Widespread media coverage including two television stations, WJHG-TV and WDTB-TV showing film of the Defendant, Carl Jackson, in the custody of the Sheriff of Bay County being transferred to the Bay County Courthouse for his First Appearance. Said picture showed the Defendant handcuffed and surrounded by Sheriff's Deputies and other law enforcement officials. Said television broadcasts were extended to other counties within the Fourteenth Judicial Circuit.

(3) The Panama City News Herald published articles with headlines indicating the Defendant was involved in satanic activities. In addition there were several other pre-trial newspaper articles which worked to the detriment of the Defendant's right to receive a fair trial within the Fourteenth Judicial Circuit.

(4) Radio Stations WDLP, WPFM and WGNE broadcasted regularly and repeatedly prejudicial and unsworn information concerning this case.

(5) Rumor, gossip, hearsay and other unsworn information was spread by word-of-mouth throughout the citizenry of the Fourteenth Judicial Circuit as evidenced by Affidavits accompanying the Defendant's Motion for Change of Venue.

(6) Further, the pardon of Pitts and Lee was handed down during the week of trial in this cause further inflaming the pre-trial prejudice to the Defendant in this cause.

C. Ground III - The Defendant suffered fundamental and prejudicial error by way of the impermissible comment on the Defendant's rights protected under the Fifth and Sixth Amendments to the Constitution of the United States.

Supporting Facts: During direct testimony of a State's Witness (Bay County Sheriff Easterling), said witness, without solicitation by the Defendant, testified that the Defendant stated, "I want a lawyer.", after being questioned by law enforcement authorities.

D. Ground IV - That the Defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution were prejudiced by the admittance into evidence of a gruesome and inflamatory photograph which had no relevance to any issue in the case, and merely inflamed the passions and prejudices of the jury against the Defendant.

Supporting facts: A picture of the victim (State's exhibit # fourteen) which the trial court had ruled was inflamatory was introduced, over objection of the Defendant, into evidence without the requisite showing of its relevance, by the State, to some issue in the case. Further, the Court denied a mistrial requested by the Defendant of this same ground.

E. Ground V - That the Defendant suffered violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution by improper and prejudicial remarks by the prosecutor throughout the trial and during closing srguments.

Supporting facts: The record is innundated by actions and comments of the prosecutor to the prejudice of the Defendant's rights of due process and a fair trial including, but not limited to:

(1) Improper leading questions

(2) Ignoring the trial court's sustaining of Defendant's objections to improper and leading questions

(3) Improper repitition and emphasis of state-witnesses' answers

(4) Misstatements of the facts and the law in this cause

F. Ground VI - That the Defendant's rights as guaranteed by the decision in Miranda v Arizona, 384 U.S. 436 (1966), were violated, notwithstanding the fact that the Defendant orally

waived those rights.

Supporting facts: The Defendant had exercised his constitutional right to remain silent and have assistance of counsel at the time of arrest and this right was not waived by an intervening period of time in excess of ten (10) hours, with the consequent psychological pressure to talk and denial of opportunity to confer with counsel, at the end of which the Defendant asked to speak to a law enforcement investigator and made inconsistent and thereby incriminating statements.

G. Ground VII - That the Defendant's conviction and sentence were imposed, in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, by a jury selected through procedures that systematically excluded from jury service persons having scruples against the death penalty, in violation of Witherspoon v Illinois, 391 U.S. 510. Said exclusion worked to the Defendant's detriment in both the guilt phase and penalty phase of this case.

Supporting Facts: The record is replete with instances of denial of the Witherspoon principles, for example: On pages 273 through 274 of the Transcript, Mr. Powell is excused for cause by the state, without instruction by the State or Court as to the Witherspoon principles and over the attempted objection of the Defendant for the failure of both the State and the Trial Court.

H. Ground VIII - The Defendant was denied his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution for failure to have and failure of defense counsel to request that seperate juries be selected for the guilt phase and penalty phase or in the alternative, that jurors unable to impose the death penalty be excused at the time, if necessary, of the penalty phase.

Supporting facts: The record is void of any such request. Excusing jurors opposed to the death penalty from the guilt phase denies the Defendant his rights under the Sixth and Fourteenth Amendments to the United States Constitution and his right to a representative jury. A death qualified jury has been shown

to be more likely to find guilt than is a jury chosen without regard to Witherspoon scruples.

I. Ground IX - The death sentence imposed on the Defendant violates his right to due process and equal protection in that it was imposed pursuant to a pattern and practice of racial discrimination in capital sentencing.

Supporting facts: The death penalty discriminates against black people and in favor of white people. Fifty percent of Florida's murder victims are white, yet their killers comprise ninety-five percent of Florida's "death row." No white person has ever received the death penalty for killing a black person. The death penalty in Florida is far more likely to be imposed in "black on white" homicide cases than in any other racial mixture of victim-defendant.

J. Ground X - That the Defendant's fundamental rights were denied at time of sentencing in the following ways:

(1) Improper doubling of aggravating circumstances in that the Trial Court found the killing of Ann Patterson Butler to have occurred both, "during the commission of a felony" and "for pecuniary gain."

(2) Improper combining of aggravating circumstances in that the Trial Court considered the aggravating circumstances of both homocides in outweighing the mitigating circumstances when the Court should have considered the circumstances of both cases separately.

(3) Improper consideration and inclusion of the aggravating circumstance of "avoiding lawful arrest."

(4) Failure of the Trial Court to properly weigh the mitigating circumstance of the Defendant having "no significant prior criminal history." Failure of the Trial Court to give proper consideration to all mitigation in that the Court did not order or consider a presentence investigation which would have revealed a significant, exemplary and heavy mitigating factor of outstanding military service. Failure of the Trial Court to give well reasoned

consideration to the imposition of sentence in the first degree murder case.

(5) Improper, innaccurate and prejudicial comments of the prosecutor during the penalty phase of this cause.

Supporting fact: The prosecutor told the jury that since the life sentence penalty for murder is identical to the life sentence penalty for robbery, robbers ought to go ahead and murder their victims. The prosecutors innaccurate statement that when someone is murdered in cold blood the penalty shall be death unless there is strong mitigation. The prosecutors statement that he could find no mitigation in this case. The Trial Court's failure to correct the innaccurate, misleading and prejudicial comments of the prosecutor.

WHEREFORE, the Defendant respectfully requests this Honorable Court to Vacate and Set Aside the Verdict in this cause, Grant a New Trial, Correct the Sentence of grant other relief as deemed appropriate.

WE HEREBY CERTIFY, that a true copy of the foregoing has been delivered to the Office of the State Attorney for the Fourteenth Judicial Circuit, Bay County Courthouse, Panama City, Florida, by Mail, this 18th day of March, 1980.

Respectfully Submitted,

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IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT, IN AND FOR PANAMA CITY, BAY COUNTY, FLORIDA.

STATE OF FLORIDA,

Plaintiff,

vs.

CARL JACKSON,

Defendant.

CASE NO: 75-258-CF

AMENDMENT TO MOTION FOR POST-CONVICTION RELIEF

COMES NOW, the Defendant, CARL JACKSON, by and through his undersigned Attorneys and enters this Amendment to his initial Motion for Post-Convication Relief filed in this Court on March 18, 1980, and says:

1. That the Defendant realleges and incorporates by reference each and every allegation of his Motion for Post-Conviction Relief filed in this Court on March 18, 1980.

2. The Defendant was denied the effective assistance of Counsel at the trial phase, sentencing phase, and on appeal in this cause. Facts supporting this allegation are as follows:

a. The Defendant's Court-Appointed Counsel, Deedee S. Costello, Assistant Public Defender, had been practicing criminal law in Panama City for only a few months at the time of the Defendant's trial. Defendant's case was Ms. Costello's first capital offense trial and did not have the requisite experience or assistance to afford the Defendant effective assistance of Counsel at his First-degree murder trial.

b. The lack of experience of Defendant's Court-Appointed Counsel which resulted in the Defendant being denied the effective assistance Counsel was evidenced by her failure to investigate and/or depose witnesses concerning the f[illegible] and circ[illegible]tances of the Defendant's arrest and the search and seizure of his residence. Further, Defendant's Court Appointed-Counsel filed no pretrial Motions attacking the sufficiency of Defendant's arrest, legality of the search and seizure of Defendant's home, or the legality of statements obtained from Defendant, due to the Defendant being denied counsel.

EXHIBIT 3

c. Defendant's Court-Appointed Counsel failed to conduct a poll of the citizenry of the Fourteenth Judicial Circuit, which poll would have shown conclusively the bias and prejudice which was present in the Fourteenth Judicial Circuit sufficient to deny the Defendant a fair trial.

d. The Defendant's Court-Appointed Counsel failed to raise any challenges to the composition of the Grand Jury returning the indictments in this cause or to the venire from which the petit jury was selected to try the Defendant in this cause.

e. Defendant's Court-Appointed Counsel failed to adequately prepare and present the Defendant's Motion for Change of Venue. From the record it appears that no formal pre-trial Motion was heard on the Defendant's Motion for Change of Venue nor were any supporting witnesses presented by the Defendant's Court-Appointed Counsel at the time of trial to show the extreme prejudice and bias existing in Bay County against the Defendant at the time of his trial.

f. The Defendant's Court-Appointed Counsel took the deposition of only one witness, Jimmy Harris. Failure to take deposition of all State witnesses denied the Defendant the opportunity to preserve statements and adequately prepare for cross-examination during trial.

g. Defendant's Court-Appointed Counsel failed to raise numerous objections, during voir dire, directed at challenges for cause made by the State Attorney in violation of the principle stated in Witherspoon v. Illinois, 391 U.S. 510 (1968).

h. Counsel failed, during voir dire, to raise numerous objections to extremely prejudicial statements elicited by the State Attorney of prospective jurors. Such prejudicial statements tainted the entire venire panel to the prejudice of the Defendant and in derigation of his right to a fair trial. Defendant's Court-Appointed Counsel failed to request a mistrial or in the alternative to have the entire voir dire panel struck because of prejudicial statements elicited from prospective jurors which denied the Defendant his right to due process and a fair trial. Further, Defendant's Court-Appointed

Counsel failed to ask for in camera and individual voir dire of prospective jurors in order to preserve the integrity of the voir dire panel and prevent undue prejudice to the Defendant's right to a fair trial.

i. Defendant's Court-Appointed Counsel failed to adequately question any of the prospective jurors during voir dire on matters of: prejudices and pre-conceived notions of the Defendant's guilt as a result of the massive pretrial publicity in this cause; racial prejudice in view of the fact that the Defendant is black, the victims were white and Panama City is a predominantly white community with strong prejudices against black people; personal knowledge by perspective jurors of the two victims who were prominant in the Panama City Community; basic principles of law such as presumption of innocence, burden of proof, circumstancial evidence and other guarantees to preserve a Defendant's right to a fair trial.

j. Counsel failed to attempt to rehabilitate numerous jurors excused for cause based on a simple affirmative response to the State Attorney's leading and conclusionary question that under no circumstances could they vote to impose the death penalty, and further asked no questions to properly present the Witherspoon principle to prospective jurors.

k. Defendant's Court-Appointed Counsel failed during voir dire to probe into any areas covered by the Prosecutor with leading and conclusionary statements and further failed to conduct an adequate voir dire in a first-degree murder case involving the possibility of the imposition of the ultimate penalty, death, against the Defendant.

l. That Defendant's Court-Appointed Counsel Counsel failed to object to the Court's excusing Juror Ramsey for a cause and failed to attempt to rehabilitate said juror.

m. The Defendant's Court-Appointed Counsel failed to object or attempt to rehabilitate the unidentified juror excused for cause on Page 207 of the Court's transcript in view of the uncertainty of that Juror's response to the Prosecutor's questioning.

n. The Defendant's Court-Appointed Counsel failed to have Juror Peters excused for cause upon his admission that he would infer guilt from the fact that the indictment had been filed against the Defendant.

o. That the Defendant's Court-Appointed Counsel failed to object or attempt to rehabilitate Jurors Taylor and Senna upon the unrequested challenge for cause entered by the Court.

p. The Defendant's Court-Appointed Counsel's failure to move for additional preemptory challenges in view of the bias and prejudice present in the venire panel, and due to the seriousness of the charge.

q. The Defendant's Court-Appointed Counsel failed to object to prejudicial comments of the Prosecutor and improper comments on the Defendant's right to remain silent by the Prosecutor during the opening argument.

r. The Defendant's Court-Appointed Counsel failure to object to the wholly improper, impermissible and prejudical opening argument presented by the Prosecutor.

s. The failure of the Defendant's Court-Appointed Counsel to object to the leading, improper and prejudicial identification of the Defendant elicited from Jimmy Ray Harris by the Prosecutor. Jimmy Ray Harris did not know the Defendant's name and had seen the Defendant only one time prior to the incident in this cause.

t. The failure of the Defendant's Court-Appointed Counsel to object to the inadmissible testimony of Officer Hillbourne in relating that specks and darks areas in photographs of victim Patterson, presented to him by the Prosecutor, were blood, in that Officer Hillbourne was never and is not an expert in the field of serology and provided no other basis for his knowing that these specks and dark areas were blood (Pages 368 and 395 of transcript).

u. The failure of Defendant's Court-Appoint Counsel to object to the admission of testimony concerning a footprint found at the scene of victim Price's murder without the proper predicate being made to establish the reliability of this testimony and its probative value.

v. Failure of Defendant's Court-Appointed Counsel to object to the leading and prejudicial question to Witness Jacquelyn Williamson with respect to her identification of the Defendant (Page 479).

w. Failure of the Defendant's Court-Appointed Counsel to object and request a mistrial due to the Prosecutor's constant and prejudicial referral to a jacket being the Defendant's in face of the trial Court's sustaining Defendant's objection's to the Prosecutor's referrals and that the jacket had not been proven to be the Defendant's (Page 504-505).

x. Failure of the Defendant's Court-Appointed Counsel to depose the fingerprint witnesses, William Sellers and Jack Duncan, to adequately prepare for the examination as to said witnesses and the reliability, qualification, relevancy and admissibility of their testimony. Defendant's Court-Appointed Counsel further failed to examine the exhibits to be used by said witnesses in their testimony and determine the necessary predicates, relevance, materiality, and admissibility of said exhibits. The failure of Defendant's Court-Appointed Counsel to depose and examine the testimony and exhibits to be introduced by said fingerprint witnesses resulted in the admission of the fingerprint identification of the Defendant at the scene of the crime when in fact the inked fingerprint card allegedly containing the known fingerprint of the Defendant was unmarked and incapable of being so identified at trial by the fingerprint witnesses. Said fingerprint identification was the only testimony of Defendant's presence at the scene of the murder of Victim Price introduced at the Defendant's trial. The Defendant's Court-Appointed Counsel further failed to request a mistrial as a result of the admission of the overwhelmingly prejudicial fingerprint evidence.

y. The failure of Defendant's Court-Appointed Counsel to depose Witness Easterling and to properly cross-examine him during the initial profer of Witness Easterling's testimony as to the sufficiency of Witness Easterling's advising the Defendant of his constitutional rights, under U.S. v. Miranda, prior to asking

any questions of the Defendant. Counsel's failure to determine if Witness Easterling determined if the Defendant could adequately read and understand the form allegedly signed by the Defendant waiving his rights. Counsel's failure to object to the admission, even during profer, of any statement made by the Defendant due to the failure of Witness Easterling to properly advise the Defendant of his constitutional rights under U.S. v. Miranda in that Witness Easterling failed to advise the Defendant that he could cease questioning at any time he desired. Said failures resulted in the admission of grossly damaging and prejudicial statements of the Defendant when in fact such statements were wholly inadmissible.

z. Failure of Defendant's Court-Appointed Counsel to adequately investigate the circumstances surrounding the Defendant's arrest and custodial interrogation which where oppressive and denied the Defendant his right to Counsel. Further the Defendant's Court-Appointed Counsel failed to have the Defendant take the stand during the profer to determine the admissibility of statements obtained from the Defendant and thereby denied the Defendant his most effective opportunity to show the illegality of statements obtained and have them suppressed.

aa. The failure of Defendant's Court-Appointed Counsel to object and move for suppression of statements of the Defendant admitting to ownership of a jacket allegedly worn by the Defendant during the commission of the crimes involved in this case, based on Witness Easterling's testimony during his profer that the Defendant requested a lawyer and desired a cease-questioning at the point Witness Easterling told the Defendant he wanted to talk with him about the two women that were murdered, rather than after the production of the jacket and the Defendant's statement that the jacket was his.

bb. Failure of Defendant's Court-Appointed Counsel to object to the testimony of Witness Easterling, werein he states, in response to the Prosecutor's question concerning his identification of the jacket, that he cannot find his initials and therefore cannot identify the jacket (Page 561).

cc. The failure of Defendant's Court-Appointed Counsel to depose or subpoena for trial the person who allegedly transcribed the question and answer session between Witness Easterling and the Defendant to determine its accuracy, relevancy, veracity, and admissibility. Also, Counsel's failure in allowing Witness Easterling to read an alleged question and answer statement between himself and the Defendant, not taken or transcribed by Witness Easterling, without first demanding that the State call the person who allegedly took the statement, and laying the proper predicate for admission of the statement or its reading.

dd. Failure of Defendant's Court-Appointed Counsel to object to Witness Easterling's impermissible reference to the Defendant's right to remain silent and further, to request a mistrial (Page 577).

ee. Failure of Defendant's Court-Appointed Counsel to object to the testimony of Witness Bill Lewis. Objections based on denial of the Defendant's right to Counsel in that he had previously asked for an attorney and one had not been provided nor had the Defendant ever been allowed to see his Counsel, failure to inform the Defendant of his Constitutional rights, initiation of questions by Witness Lewis after the Defendant had previously asked for an attorney, heresay testimony of an alleged request of Defendant to speak with Officer Sellers, made through a jailer who did not testify, all to the prejudice and denial of the Defendant's constitutionally protected rights.

ff. Failure of Defendant's Court-Appointed Counsel to make a substantial Motion for judgement of acquittal based on the insufficiency of the circumstantial evidence presented by the State and insufficiency of the evidence, had the Defendant moved for exclusion of certain evidence such as fingerprint identification and statements obtained from the Defendant.

gg. The failure of Defendant's Court-Appointed Counsel to mount an effective closing argument on behalf of the Defendant based on the lack of any substantial evidence against the Defendant and the concessions, by Counsel, of damaging evidence against the Defendant

such as the Defendant's fingerprint being present in the murder vehicle, the jacket mentioned during the testimony being the Defendant's, and the Defendant's having personal involvement in this incident as the reason why the Defendant did not take the stand and testify in his own behalf.

hh. Failure of Defendant's Court-Appointed Counsel to object to improper and prejudicial remarks of the Prosecutor during closing argument. (See transcript of prosecutor's argument as a whole.)

ii. Failure of Defendant's Court-Appointed Counsel to object to innumerable prejudicial dogmatic statements of the Prosecutor as to what the evidence proved. Also, Counsel's failure to object to arguments made by the Prosecutor based on matters outside the evidence presented. Examples of impermissible and prejudicial misstatements by the Prosecutor are found, among others, on the following pages in the transcript in this cause: Page 640, 641, 647, 651, 652, 656, 657, 658, 659, 660, 665, 666, 667, 668, 669, and 670.

jj. Failure of Defendant's Court-Appointed Counsel to raise objections to the Court's improper instruction on the law of the case.

kk. Failure of Defendant's Court-Appointed Counsel to object to the Court's improper instruction on the law as it relates to aggravating and mitigating factors in sentencing. (See U.S. v. Lockett, 438 U.S. 586 (1978), in ruling that mitigating factors were limited to those listed in Florida Statute 921.141

ll. Failure of the Defendant's Court-Appointed Counsel to adequately present mitigating factors to the jury in consideration of their advisory sentence based on Defendant's lack of any significant prior criminal history and his most exemplary military service, which resulted in the Court finding that there were no mitigating factors, and the jury not being convinced that there were any mitigating factors presented.

mm. Failure of Defendant's Court-Appointed Counsel to object to the Prosecutor's impermissible and unfounded accusations of the Defendant having a prior criminal history.

nn. Failure of Defendant's Court-Appointed Counsel to object to the following improper, impermissible and prejudicial comments of the Prosecutor on the law and facts during the sentencing phase:

(1) "if a man does murder somebody in cold blood, then the penalty shall be death unless there's some strong mitigating circumstances which relieves the person from that responsibility of taking life." (Page 781)

(2) "but, anyhow, society says to the jury, or to the court system and the jury system, you all evaluate it, and unless there's mitigating circumstances, which mitigates this crime, and the Judge is going to instruct you on what mitigating is, unless there is something to mitigate that horrible act, the punishment shall be death." (Page 782).

(3) "one out of about seven or eight of mitigating circumstances said it would be mitigation if the Defendant has no significant prior criminal activity. Then I want you to listen closely and see if there is any other mitigations that have been proved here, that is mentioned under Florida law." (Page 787).

(4) "see if Judge Spear doesn't charge you that it shall be aggravating circumstances, demanding the death penalty, when you kill somebody in a commission of a robbery, or a kidnapping, or aircraft piracy or rape" (Page 788).

(5) The Prosecutor's doubling of the aggravating circumstances of robbery and commission of the offense for pecuniary gain. (Page 788).

(6) Atributing statements to the Defendant such as, "he was holding it (the gun) right here to her head and saying, bye bye baby." (Page 790).

(7) The Prosecutor's insistence to the jury that they must find significant mitigation in Order to recommend a life sentence to the Court. (Page 791).

oo. Failure of Defendant's Court-Appointed Counsel to object again to the improper instruction of the Court that mitigating circumstances are limited to those in the Statute. (Page 795).

pp. Failure of Defendant's Court-Appointed Counsel to object to the illegal imposition of the death sentence against the Defendant, in that the trial Judge imposed said sentence upon the impermissible finding that enumerated mitigating circumstances found in Subsection 7 of Florida Statute Section 921.141, were insufficient to outweigh aggravating circumstances. (Page 811).

qq. Failure of Defendant's Court-Appointed Counsel to object to the verdict of guilt of the Defendant for the first-degree murder of Ann Patterson Butler and the sentence of death subsequently imposed by the Court. The jury had previously found the Defendant guilty of robbery of Ann Patterson Butler. The verdict of guilt for first-degree murder did not specify that it was based on pre-meditation and therefore the verdict of guilt for first-degree murder of Ann Patterson Butler based on the felony-murder rule can not be precluded. Having already been found guilty of the robbery of Ann Patterson Butler it would be double jeopardy to further find the Defendant guilty of first-degree murder based on the felony-murder rule. (Page 727). An identical situation exists with respect to the verdict of guilt of the Defendant for the first-degree murder of Mary Francis Price in that he had previously been found guilty of the underlying felony of kidnapping of Mary Francis Price. (Page 728).

rr. Failure of Defendant's Court-Appointed Counsel to object to the imposition of the death penalty imposed against the Defendant in both cases for the identical reasons cited in Counsel's previous allegation and denial of Defendant's right against double jeopardy.

ss. Failure of Defendant's Court-Appointed Counsel to object to the Court's impermissible and confusing findings of fact upon which the sentences of death imposed on the Defendant are based. These findings: 1. double aggravating circumstances; 2. fail to specify that the murder of Mary Francis Price was not considered as an aggravating factor in the murder of Ann Patterson Butler; 3. fail to consider substantial mitigating factors within and without those specifically enumerated in Florida Statute 921.141; 4. fail to delineate any findings of fact as to the murder of Mary Francis Price.

tt. Failure of Defendant's Court-Appointed Counsel to make any argument whatsoever in mitigation prior to the imposition of sentence against the Defendant.

uu. Failure of Defendant's Court-Appointed Counsel to raise any of the aforementioned instances of ineffective assistance of Counsel on appeal.

3. The Defendant was sentenced in violation of the principle established in Lockett v. U.S., 438 U.S. 586 (1978).

4. The Defendant was tried and sentenced in violation of the principle established in Witherspoon v. State of Illinois, 391 U.S. 510 (1968). Excuse for cause of Juror Powell violated Witherspoon. (P. 274)

5. That the Defendant was sentenced in violation of the principle established in Godfrey v. Georgia, 100 S.Ct. 1759 (1980).

WHEREFORE, the Defendant respectfully renews the request made in his original Motion for Post-Conviction Relief and prays this Court to enter its Order reversing the Defendant's conviction and granting him a new trial, overturn the penalties imposed in this cause and grant other relief deemed appropriate by the Court.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Leo C. Jones, State Attorney, Bay County Courthouse, Panama City, Florida this 26th day of July, 1980.

Respectfully submitted,

LAW OFFICES OF TURNER & MORRIS

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LAW OFFICE OF BILL SALMON

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IN THE CIRCUIT COURT OF THE
FOURTEENTH JUDICIAL CIRCUIT, IN
AND FOR BAY COUNTY, FLORIDA.

STATE OF FLORIDA,

Plaintiff,

CASE NO: 75-258

vs.

CARL JACKSON,

Defendant.

SECOND AMENDMENT TO DEFENDANT'S MOTION
FOR POST-CONVICTION RELIEF

COMES NOW, the Defendant, CARL JACKSON, by and through his undersigned Attorney and enters this, his second amendment to Defendant's Motion for Post-Conviction Relief, and says:

1. That the Defendant realleges and incorporates by reference each previous allegation made in his original and amendment to Motion for Post-Conviction Relief.

2. That additional instances of the Defendant not being afforded the effective assistance of Counsel are:

a. The failure of Defendant's Court-Appointed Counsel to request a pre-sentence investigation be completed prior to the imposition of sentence in this cause. Defendant has no significant prior criminal history and has substantial family and community character support that would have been verified to the Court in mitigation of sentence to be imposed in this cause.

b. The failure of Defendant's Court-Appointed Counsel to have the Defendant examined psychologically and psychiatrically to provide a basis of support for the Defendant's post-tramatic stress disorder and other mental disorders which would have provided mitigating support during the sentencing of the Defendant in this cause.

c. Failure of Defendant's Court-Appointed Counsel to request sufficient additional time after the verdicts of guilt in this cause to prepare for the sentencing phase of Defendant's trial. Said failure resulted in the witnesses that were presented by Defendant's Counsel being unprepared (testifying psychologist

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did not even have a report or notes during her testimony) and denied the Defendant the opportunity to present family and community character and mitigating witnesses.

WHEREFORE, the Defendant respectfully requests this Court to consider this second amendment in entering its Order to grant the Defendant a new trial, overturn the Defendant's sentence and grant other relief as deemed appropriate by this Court.

Respectfully submitted,

LAW OFFICES OF TURNER & MORRIS

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I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to LEO C. JONES, III, State Attorney, Post Office Box 1040, Panama City, FL 32401, this day of , 1980.

LARRY TURNER

BILL SALMON

IN THE CIRCUIT COURT OF THE
FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR PANAMA CITY, BAY
COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

Case No. 75-258-CF

CARL JACKSON,

Defendant.

/

ORDER

Petitioner filed a Motion for Post-Conviction Relief on March 19, 1980. Petitioner filed an Amendment to his Motion for Post-Conviction Relief on July 29, 1980, and a Second Amendment to his Motion for Post-Conviction Relief on July 31, 1980.

On May 20, 1980, Respondent filed a Motion to Dismiss directed to Petitioner's original Motion for Post-Conviction Relief. On September 5, 1980, Respondent's Motion to Dismiss was called on for hearing in chambers.

After considering Respondent's Motion to Dismiss and the argument of counsel on that Motion in chambers, it is ORDERED AND ADJUDGED that the Respondent's Motion to Dismiss is GRANTED in respect to all grounds raised in Petitioner's original Motion for Post-Conviction Relief filed March 19, 1980.

Petitioner raised ten grounds for relief in his original Motion for Post-Conviction Relief. Attached hereto and by reference made a part hereof are the following: (1) copies of Petitioner's (Appellant's) Initial and Reply Briefs to the Florida Supreme Court in this cause; (2) a copy of the Florida Supreme Court's Opinion rendered in this cause and reported at 359 So.2d 1190 (Fla. 1978); (3) copies of the Petitioner's Petition for Writ of Certiorari to the Supreme Court of Florida and the United States Supreme Court, including the Appendix attached thereto and his Reply to the Respondent's Reply to his Petition.

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All of the issues raised in Petitioner's original Motion for Post-Conviction Relief are improper subject matter for such a motion because they are: (1) issues raised and disposed of on direct appeal. Meeks v. State, 382 So.2d 673 (Fla. 1980), and Witt v. State, Florida Supreme Court Case No. 58,321, Opinion issued July 24, 1980; (2) issues which could have and should have been raised on direct appeal and were not. Meeks v. State; (3) issues for which no relief exists as a matter of law. Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. den. 440 U.S. 976, 99 S.Ct. 1548, reh. den. 441 U.S. 937, 60 L.Ed.2d 667, 99 S.Ct. 2064, and [illegible] v. St[illegible].

Grounds I and VI raise the issue that Petitioner was denied due process of law because he was denied access to an attorney. These grounds either were raised on direct appeal or could have and should have been raised on direct appeal. These grounds were argued in the Appellant's Initial Brief at pages 39-43 and disposed of in the Florida Supreme Court's Opinion in this case. Petitioner also raised this issue in his Certiorari Petition to the Florida Supreme Court taken in the United States Supreme Court in his Petition at 5.

In Ground II, Petitioner complains that he was denied his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution because the trial court erred in refusing to grant his Motion for Change of Venue. This issue was argued on direct appeal at the Appellant's Initial Brief at pages 28-32 and disposed of in the Florida Supreme Court's Opinion in this case.

In Ground III, Petitioner claims that his right to a fair trial under the Fifth and Sixth Amendments of the Constitution of the United States was denied because of an "impermissible comment" that occurred during the direct testimony of State's witness Bay County Sheriff Easterling. This issue was argued by the Petitioner in his Initial Brief at pages 37 and 38 and disposed of in the Florida Supreme Court's Opinion in this case.

Under Ground IV, Petitioner alleges that he was denied

his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution because the trial court erred in admitting into evidence an alleged inflammatory photograph. This issue was argued in the Petitioner's Brief at pages 33 through 36 and disposed of in the Florida Supreme Court's Opinion in this case.

Under Ground V, Petitioner complains, inter alia, about improper leading questions, misstatements of fact and law in the trial, improper repetition in emphasis of State witnesses' answers, and other procedural occurrences at trial. This issue could have and should have been raised on direct appeal.

Under Ground VII, Petitioner argues that his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution were denied because the jury was selected through procedures that systematically excluded persons having scruples against the death penalty in violation of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), reh. den. 393 U.S. 898, 89 S.Ct. 67, 21 L.Ed.2d 186. This issue could have and should have been raised on direct appeal. Further, this issue is raised under the ineffective assistance of counsel claims in Petitioner's Amendments to his original Motion for Post-Conviction Relief.

Under Ground VIII, Petitioner argues that he was denied his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution because his trial counsel failed to request that separate juries be selected for the guilt and penalty phase of his trial. Petitioner has cited no law in support of this claim and there is no law known to this Court that would require such a request. Consequently, Petitioner has failed to state a claim for which there is relief.

Under Ground IX, Petitioner argues that his rights to due process and equal protection were violated because the death penalty discriminates against black people and in favor of white people. This claim was specifically rejected in Meeks v. State and is "the law of the case" to which this Court is bound.

Under Ground X, Petitioner alleges that his "fundamental rights" were denied for various sentencing errors, all of which either were raised or could have and should have been raised on direct appeal. See, e.g., the Appellant's Brief at 56 and the Florida Supreme Court's Opinion in this case.

DONE AND ORDERED at Panama City, Bay County, Florida, this 14 day of [illegible], 1980.

FRED TURNER, CIRCUIT JUDGE

cc: Judy M. Pittman
Assistant State Attorney
14th Judicial Circuit

Larry Gibbs Turner and
Bill Salmon
Attorneys for Petitioner

David P. Gauldin
Assistant Attorney General

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR BAY COUNTY. CASE NO. 75-253.

STATE OF FLORIDA,

vs.

CARL JACKSON,

Defendant.

O R D E R

The Defendant has filed a Rule 3.850 motion alleging, inter alia that his trial counsel was ineffective. The Court has previously denied relief on all other grounds except ineffectiveness of counsel.

The Court on November 3 and 4, 1980, has conducted an evidentiary hearing in compliance with MEEKS VS. STATE, 332 So.2d 673, and permitted counsel to submit briefs, and upon consideration of the evidence and the briefs, the Court finds that the evidence, motions and the files and records in this case conclusively show that the Defendant is entitled to no relief.

From the beginning to the end of the evidence phase of this motion, it was apparent to the Court that it was the position of the Defendant that he was entitled to a textbook defense and the Court has no quarrel with that ideal but the record shows that defense counsel exercised every reasonable defensive weapon available to her. Considering that every trial is different from every other and even a re-trial is different from an original trial, the rules laid down by our appellate courts for the conduct of counsel must make some allowances for the exigencies of the case. I doubt that any of our appellate courts have ever reviewed a textbook defense in a criminal case. I do not deprecate the efforts of appellate counsel to belittle the efforts of trial counsel, but trial counsel should not bear the brunt of scatter gun motions where the evidence in support of said motion is but mere conjecture, supposition and questionable deductions. A printed transcript may suggest a deficiency in trial counsel's preparation and conduct on the one hand

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when in truth and in fact, trial tactics dictated the course taken at trial. From the totality of the circumstances in this case, it is the finding of the Court:

A. That Dedee Costello rendered effective assistance of counsel to the Defendant, Carl Jackson.

B. That her lack of experience (at that time) did not deprive the Defendant of a fair trial nor was it prejudicial to him at the trial.

C. There was no intentional or unintentional omission by trial counsel of any duty devolving upon her at trial which resulted in any prejudice to the Defendant, and.

D. That trial counsel exhibited the highest standards of ethical conduct in her defense of the Defendant.

I cannot find fault, on the contrary, I commend, Ms. Costello for her defense of the Defendant who was charged with the murder of two female victims within a short period of time and whose bloody fingerprint was found underneath the head of the second victim. Considering the defenses available to Ms. Costello, insanity, alibi, intoxication and soddi (some other dude did it), she was left with little choice but to attack the State's presentation of its evidence in chief. She performed well and adequately in the mechanical portions of the trial and nothing less than a magic wand could have erased the Defendant's fingerprint under the head of his second victim. It is justly said that hindsight is 20/20; judged by that standard, I cannot conceive of anything that trial counsel did or failed to do which would have changed the results of the trial in any material particular nor can I see of the totality of the circumstances surrounding this case that Ms. Costello was remiss in her obligation towards the Defendant to render him effective assistance of counsel. Accordingly, it is,

ORDERED and ADJUDGED that the Defendant's amendment to Motion for post conviction relief and second amendment for post conviction relief alleging ineffectiveness of counsel under Rule 3.850, RCrP, be and the same is hereby denied. It is further,

ORDERED and ADJUDGED that the Defendant is advised that he has the right to appeal this order to the District Court of Appeal, First District of Florida, and if he wishes to appeal, he must file his notice of appeal with the Clerk of this Court within thirty (30) days of this date. If he does not have the funds to pay for the appeal, the undersigned will appoint an Attorney to take the appeal for the defendant at no expense to him.

ORDERED at Panama City, Bay County, Florida, this 31 day of December, 1980.

W. Fred Turner

W. FRED TURNER, CIRCUIT JUDGE

for mistrial relating to the ineffective assistance of counsel. Clearly, in my opinion, it was constitutionally required to address the issue on the merits. This issue was raised at trial and was ruled on by the trial judge. I would consider the issue on its merits and dispose of it at this time since the matter was ruled on by the trial court and has been argued on the merits in the briefs before this Court.

The purpose of a Rule 3.850 proceeding is to provide an expeditious remedy for attacking a judgment or a sentence imposed in violation of the constitution and laws of the United States or of the State of Florida. It clearly was not intended to provide an additional proceeding for an issue which was presented to the trial court and properly raised on appeal. In this case we are setting a bad precedent by encouraging multiple judicial proceedings which are not required.

In my view, upon the first indication or knowledge by the trial judge that there is ineffective assistance of counsel, he should immediately address the issue, take testimony if necessary, and resolve it. To leave the issue open for further proceedings only creates unnecessary work for prosecutors, defense counsel, and the judiciary.

The trial judge in this instance expressed concern that to grant a mistrial for ineffective assistance of counsel would set a dangerous precedent, opening the door for this issue to be used in a tactical manner in criminal trials. I disagree with the trial judge's concern. Although a defendant may be entitled to a mistrial because his counsel was dilatory and unprepared, that does not mean that there is no recourse to avoid the improper use of our criminal justice process. Counsel guilty of such conduct would be subject to sanctions which could include counsel personally paying the costs and expenses of the trial up to the time of the mistrial, in addition to counsel being subject to appropriate disciplinary proceedings. I reject the view asserted by the attorney general that trial counsel is neither legally nor ethically competent to raise his own ineffectiveness before the trial judge. In Valle v. State, 394 So.2d 1004 (Fla.1981), we recognized that it was a proper issue to be brought up by trial counsel where the failure to prepare was brought about by the speed in which the case was brought to trial and not by trial counsel's dilatory action. In this case, counsel's alleged ineffectiveness was argued to have been caused, at least in part, by defense counsel's physical condition. In both instances counsel was unprepared.

I would find that on this record the trial judge should have taken more time to have a hearing on the issue. The contentions of counsel are basically unrefuted and, therefore, on this record, I must find that a mistrial should have been granted. I also would find, however, that the conduct of petitioner's counsel justified sanctions in the amount of the cost of the proceedings up to the time of the motion for mistrial. In addition, I would direct that the record in this cause be referred to the appropriate grievance committee for possible disciplinary action.

For the reasons expressed, I would reverse and remand for a new trial.

Carl JACKSON, Appellant,

v.

STATE of Florida, Appellee.

No. 60202.

Supreme Court of Florida.

July 28, 1983.

Rehearing Denied Sept. 30, 1983.

The Circuit Court in and for Bay County, W. Fred Turner, J., denied motion for postconviction relief, and movant appealed. The Supreme Court, Adkins, J., held that movant, who was found guilty of robbery,

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kidnapping and two counts of first-degree murder and sentenced to death, was not denied effective assistance of counsel at trial, sentencing or on appeal.

Affirmed.

Ehrlich, J., dissented.

1. Criminal Law ⇐998(3)

Movant's allegations that excusal of certain prospective jurors violated United States Supreme Court decision could and should have been raised in his initial appeal, along with questions whether trial court erred by not ordering presentence investigation and whether jury instructions and sentencing order violated another United States Supreme Court decision, and thus those issues were not cognizable on motion for postconviction relief. West's F.S.A. RCrP Rule 3.850.

2. Criminal Law ⇐641.13(2, 7)

Movant, who was convicted of robbery, kidnapping and two counts of first-degree murder and sentenced to death, was not denied effective assistance of counsel at trial, sentencing or on appeal where lack of objection to labeling of fingerprint did not prejudice movant, where "failure to investigate and present defense" and to request instructions on effect of jury recommendation of mercy constituted reasonable strategy, and where any deficiencies in voir dire examination did not affect outcome of proceedings.

Larry G. Turner of the Law Offices of Larry G. Turner, and Bill Salmon of the Law Offices of Bill Salmon, Gainesville, for appellant.

Jim Smith, Atty. Gen. and David P. Gaulin, Asst. Atty. Gen., Tallahassee, for appellee.

ADKINS, Justice.

This is an appeal from an order of the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County denying a motion for post-conviction relief. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Appellant, Carl Jackson, was charged with robbery, kidnapping, and two counts of first-degree murder. The crimes are described in more detail in our opinion in *Jackson v. State*, 359 So.2d 1190 (Fla.1978), *cert. denied*, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 62 (1979) (hereinafter *Jackson I*). Ms. Dedee Costello was appointed to represent appellant at trial and entered on his behalf a plea of not guilty. He was, however, found guilty on all counts.

At the conclusion of the sentencing phase of the trial, the jury recommended that appellant be put to death for both murders. The trial court concurred and imposed the death penalty, which this Court affirmed. *Jackson I*. Appellant thereafter filed in the circuit court, pursuant to Rule 3.850, Florida Rules of Criminal Procedure, a motion for post-conviction relief alleging several infirmities in the conduct of his trial. The circuit court denied the motion and this appeal followed.

[1] Three of the four issues argued by appellant are matters that could or should have been raised on direct appeal, and so are not cognizable in this proceeding. *Adams v. State*, 380 So.2d 423 (Fla.1980). Appellant's allegations that the excusal of certain prospective jurors violated *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), could and should have been raised in his initial appeal to this Court. *Meeks v. State*, 402 So.2d 673 (Fla. 1980). Similarly, he should have argued the questions of whether the trial court erred by not ordering a presentence investigation and whether the judge's jury instructions and sentencing order violated the decision in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). We need not consider these three issues in this opinion.

[2] The issue properly raised in this proceeding is appellant's contention that the trial court erred in finding that he was afforded effective assistance of counsel at trial, sentencing, and appeal. First in the list of alleged errors and omissions is defense counsel's "failure to adequately conduct discovery, investigate, and prepare in

anticipation of trial." Appellant notes that his attorney deposed only one of the more than twenty potential witnesses named on a list provided by the state and so was "obviously disadvantaged" in her cross-examination of the state's witnesses. The lack of depositions also hindered counsel's attempts to have suppressed certain evidence introduced at trial, claims appellant.

Next in the list of alleged errors are the failure to timely object to the introduction of a fingerprint which appellant claims was not properly marked as his and counsel's "ineffective" efforts to obtain a change in venue. Both are attributed to his attorney's "lack of experience and preparation."

Defense counsel's voir dire examination of potential jurors is faulted in several ways. Appellant argues that the issues of pre-trial publicity and racial bias were only cursorily and ineffectively delved into, and that counsel's *Witherspoon* inquiry was glaringly deficient. Also faulted are his counsel's failure to request sequestered voir dire of certain prospective jurors and to ask for additional peremptory challenges after using the forty allotted appellant.

The total "failure to investigate and present a defense" is a significant example of the inadequate representation which he received, claims appellant. He argues that his lawyer was made aware of several individuals whose testimony might have provided an alibi defense, and that she failed to investigate and develop the same simply because an assistant state attorney assured her that the men in question would testify that they had not been with appellant at the relevant times. Finally, appellant notes that his counsel failed to request jury instructions on the effect of a jury recommendation of mercy and did not request a presentence investigation report before the trial court passed sentence.

In *Knight v. State*, 394 So.2d 997 (Fla. 1981), we established the standards which must be met by a party alleging ineffective assistance of counsel as here. The four-part test requires:

> First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.
>
> Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel. As was explained by Judge Leventhal in *DeCoster III* [*United States v. DeCoster*, 624 F.2d 196 (D.C.Cir. 1979)]: "To be 'below average' is not enough, for that is self evidently the case half the time. The standard of shortfall is necessarily subjective, but it cannot be established merely by showing that counsel's acts or omissions deviated from a checklist of standards." 624 F.2d at 215. We recognize that in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances.
>
> Third, the defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings. In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error. This requirement that a defendant has the burden to show prejudice is the rule in the majority of other jurisdictions.
>
> Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the state still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact. This opportunity to rebut applies even if a constitutional violation has been established.

394 So.2d at 1001 (footnote omitted).

Although appellant met the first requirement above, he failed to show that most of the omissions were serious deficiencies beyond what would be expected of competent counsel. His expert witness' testimony that

defense counsel's pre-trial discovery and motions were inadequate was countered by that of appellee's expert witness who stated that the representation provided was "reasonably effective." The trial court agreed with appellee's witness and nothing in the record compels us to disturb that result.

The lack of objection to the labeling of the fingerprint also fails to convince us that counsel was ineffective. Even if we agreed that such was measurably below what is expected of competent attorneys, it certainly did not so prejudice appellant that he might otherwise not have been found guilty, since it was not disputed that his fingerprint was found at the scene.

The remainder of the alleged shortcomings may be dismissed in a similar manner. The "failure to investigate and present a defense" and to request instructions on the effect of a jury recommendation of mercy do not fall measurably below the standard expected of competent counsel. Although appellant is obviously dissatisfied with the result of the defense that was presented, we will not use the perfect vision of hindsight and label that defense incompetent. It was, under the circumstances, a reasonable strategy.

Defense counsel's voir dire examination regarding pretrial publicity, racial bias, and imposition of the death penalty was not so lacking as to be considered incompetent. If it was deficient at all, it was not substantial enough to demonstrate a prejudice to appellant so severe that it affected the outcome of the proceedings. The record shows that appellant's guilt was clearly and convincingly demonstrated by more than adequate evidence. Any shortcomings in voir dire were not the conclusive and decisive factors in his conviction.

As the trial court noted in denying appellant's rule 3.850 motion, a "textbook defense" is not the requirement here. The trial court heard the arguments in the 3.850 hearing, considered the expert testimony presented by both sides, and determined that the representation afforded appellant was adequate. None of the arguments raised convince us that said decision was unsubstantiated or incorrect, and so the trial court's decision is affirmed.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON and McDONALD, JJ., concur.

EHRLICH, J., dissents.

Larry Alan STRICKLAND, Petitioner,

v.

STATE of Florida, Respondent.

No. 62358.

Supreme Court of Florida.

July 28, 1983.

Rehearing Denied Sept. 29, 1983.

Defendant was convicted before the Circuit Court, Bay County, W. Fred Turner, J., of attempted first-degree murder with a firearm, and he appealed. The District Court of Appeal, 415 So.2d 808, affirmed, and a further appeal was taken. The Supreme Court, Ehrlich, J., held that since use of a firearm was not an essential element of crime of attempted first-degree murder, life sentence was correct.

Affirmed.

1. Criminal Law ⇐1208.6(2)

First-degree felony must be reclassified to a life felony if a weapon or firearm is used as long as the use of the weapon or firearm is not an essential element of the charged crime; receding from *King v. State*, 390 So.2d 315 (Fla.1980). West's F.S.A. § 775.087.

2. Homicide ⇐354

Since use of a firearm is not an essential element of crime of attempted first-de-

IN THE SUPREME COURT OF FLORIDA

CARL JACKSON,	)	ON APPEAL FROM THE FOURTEENTH JUDICIAL CIRCUIT COURT, BAY COUNTY, FLORIDA
Appellant,	)	
VS	)	CASE NO. 60-202 75-258-CF
THE STATE OF FLORIDA,	)	
Appellee.	)	

APPELLANT'S
MOTION FOR REHEARING

The Appellant, CARL JACKSON, by and through his undersigned counsel and pursuant to Rule 9.330, Florida Rules of Appellate Procedure, respectfully moves this Court for a rehearing of the above-styled cause based upon overlooked or misapprehended points of fact and law in the published Opinion of this Tribunal dated 28 July 1983. In support of his Motion the Appellant CARL JACKSON, (hereinafter "Jackson") would show that this Court in determining that the failure of Jackson's attorney to investigate and present a defense did "... not fall measurably below the standard expected of competent counsel," overlooked the law with reference to this issue as enunciated by the Eleventh Circuit Court of Appeals in its recent decision of Weidner v. Wainwright, Case No. 82-5122, and decided on June 27, 1983. In that case, the Defendant Weidner was convicted in State Court in the State of Florida of second-degree murder. His conviction was affirmed on direct appeal

EXHIBIT 8

[Weidner v. State, 318 So.2d 502 (Fla. 2d DCA 1975) and Weidner v. State, 322 So.2d 671 (Fla. 2d DCA 1975)] and he subsequently was denied post-conviction relief. [Weidner v. State, 352 So.2d 181 (Fla. 2d DCA 1977) and Weidner v. State, 341 So.2d 302 (Fla. 2d DCA 1976)]. Having exhausted his State remedies, Weidner filed a Writ of Habeas Corpus in the District Court for the Middle District of Florida, Tampa Division. The Honorable Terrell Hodges, Chief Judge, adopted the recommendations of the Magistrate and granted the Writ. The facts of Weidner's case as elicited at trial established that one Joey Motz, the victim, was shot in the parking lot of a bar in Tampa. Weidner, a patron of the bar, was approached by Motz and four or five of Motz's friends. Although Weidner was intoxicated at the time, he managed to retrieve a gun from his car and warned Motz and his friends to come no closer. Apparently Motz did not heed the warning but instead jumped on Weidner's car and was shot and killed by Weidner. At trial, Weidner's privately retained counsel (Hobbs) argued a theory of accident or, alternatively, excusable homicide. A self-defense theory was mentioned in passing and an instruction on the defense was given by the Court; however, self-defense was never argued seriously to the jury. This was despite the fact that Weidner had told Hobbs that he was attacked and that his money was missing when he arrived at the police station. The District Court, on Weidner's habeas corpus Petition, found that prior to his trial, Weidner's attorney did not hire an investigator nor did he send an associate of the firm to the scene of the shooting. Hobbs

did not acquire a copy of the autopsy report, nor did he depose the medical examiner or the arresting officer.

Once the trial was completed, four witnesses were discovered whose testimony would have supported Weidner's self-defense theory. Clifford Schultz testified that it was generally known that Weidner carried large amounts of cash at the bar, as he did the night of the shooting. Schultz further testified that he overheard Motz and his friends plan to rob Weidner. Dorothy Walker, who also was present the night of the shooting, would have testified that Weidner had a large amount of cash, that it was generally known that Motz robbed patrons of the bar, and that Motz went outside to rob Weidner the night of the shooting. Glen Allen would have testified that the men at the bar, including Motz, were going to rob Weidner. And finally, John Priestly would have testified that Motz confided in him that he had previously robbed Weidner. The Eleventh Circuit held that the case "cried out" for a theory of self-defense and that the above-listed witnesses would have been beneficial to that defense. The Court went on to hold that Hobbs' failure to obtain the autopsy report or to interview the medical examiner prejudiced Weidner's defense since the autopsy report indicated a trajectory of the bullet which was inconsistent with the State's theory of the incident. Finally, the Court, quoting from other decisions the citations of which are omitted here, concluded that "at the heart of effective representation is the independent duty to

investigate and prepare. Therefore, permissible trial strategy can never include the failure to conduct a reasonably substantial investigation into a Defendant's one plausible line of defense." (at 3751) The Eleventh Circuit then upheld Judge Hodges' grant of habeas corpus relief.

In comparing the Weidner decision with the case at bar, it is clear that the failure of JACKSON's court-appointed counsel to adequately conduct discovery, investigate and prepare in anticipation of trial, falls well below the standard of effective assistance of counsel as applied in Weidner. Of more than 20 witnesses named in discovery by the State, JACKSON's attorney deposed only one. Of the remaining witnesses, she neither deposed nor interviewed any with the exception of cross-examination at a preliminary hearing of Arnold Lee Price, the husband of one of the victims. Ms. Costello admitted that this cross-examination was limited because of Mr. Price's emotional condition at the time of the preliminary hearing and the restrictions imposed on cross-examination at preliminary hearings. (TH-33) Thereafter, Ms. Costello made no effort to interview or depose Mr. Price. Likewise, Ms. Costello neither interviewed nor deposed:

1. Panama City police officer Dan Hilburn, the first officer responding to the scene. (T-358 et seq.)

2. Evelyn Shipes, the District Manager for Sunshine Grocery which operated the Junior Food Store (the scene of the crime) who testified to the proceeds of the robbery and who identified the victim Ann Patterson Butler as an employee of the store who was on duty on the date in question. (T-374-388)

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3. Panama City police officer Ralph Porter, who discovered the body of Mrs. Price in her automobile where it had been abandoned at a local cemetery. (T-410-421)

4. Panama City police Sergeant Tommy Winslett, who also responded to the cemetery and who testified, inter alia, to the identity of Mrs. Price. (T-426)

5. Powell Adams, who assisted in the search of the cemetary area and who testified that he found a tan jacket lying under a piece of tin in the woods behind the cemetery. This is significant because other witnesses testified that the Defendant JACKSON owned and/or was wearing on the date in question a jacket variously described as gold with a rainhood to beige with no hood. The jacket Mr. Adams found was tan with no hood. (T-444-449)

6. Dr. Ralph Monaco, the medical examiner who testified as to injuries and cause of death of both women. (T-445-467)

7. Jacquelyn Williamson, who saw the Defendant JACKSON at approximately the time of the incident when he appeared at her apartment which is located behind the cemetery previously mentioned. (T-479-485)

8. Jack Mason, then a camera man for a local television station, who gave the Defendant JACKSON a ride at approximately 10:15 a.m. on the morning in question (the crime having been committed some time between 8 and 9 a.m. that morning). Mason testified that the Defendant JACKSON appeared to know about the shooting at the cemetery even though the information to that effect had not yet been released to the news media. (T-490-493)

9. Jack Duncan, a fingerprint examiner with the Florida Department of Law Enforcement, who testified that one of the Defendant's fingerprints was found on a package of

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Kool cigarettes found inside the Price motor vehicle. Duncan concluded this by comparing the fingerprint with a set of ink fingerprints which Bay County Deputy Sheriff William Sellers testified he took from the Defendant. However, at trial, the ink prints which Sellers claimed were the Defendant's had no markings or writings on the card to identify them as having been taken by Sellers or from JACKSON. In addition to her failure to depose Duncan, JACKSON's court-appointed attorney failed to depose Sellers and failed to inspect the fingerprint evidence. This failure resulted in her not objecting to Sellers' identification of the card of ink fingerprints as being those of the Defendant and thus, they were allowed into evidence as "undisputed testimony". (T-534)(T-523-531)

10. Bay County Sheriff Easterling, who testified, inter alia, to an incriminating statement made by the Defendant JACKSON. (T-579 et seq.) As a result of her failure to depose Sheriff Easterling, Defendant JACKSON's court-appointed counsel filed no pretrial motion testing the admissibility of the incriminating statement and at trial she interposed the weak objection of simply "Judge, we object to the introduction of the statement on the grounds that it was not freely and voluntarily given." (T-565) No pretrial motion nor objection was made predicated upon the Defendant's request for counsel, and notwithstanding the sheriff's admission that the Defendant had made such a request. (T-42,104)

11. Bay County Deputy Sheriff William Sellers, and Tom McCauley, Stenographer Janet Boyd and Bay County police officer Mancil, all of whom were present during the above-referenced statement to Sheriff Easterling. (T-519)

12. Bay County Deputy Sheriff Bill Lewis who testified among other things, to a second statement made by the Defendant JACKSON which statement was contradictory to the statement JACKSON gave to Sheriff Easterling. Again,

> this failure to depose the witness resulted in no pretrial motion testing the admissibility of the statement and again only a weak trial objection was raised, to-wit: "Judge, I object to the introduction of the statement on the grounds that Mr. JACKSON was represented by counsel and counsel was not informed of this interview in advance." (T-592) (T-582-600)

Another significant parallel between the case at bar and Weidner appears from Ms. Costello's failure to search out and interview defense witnesses. At the hearing on the Defendant's MOTION FOR POST-CONVICTION RELIEF, JACKSON testified that he told Ms. Costello where he was on the date and time in question and gave her the names of individuals who could testify thereto. (RH-89 et seq.) Indeed, Ms. Costello testified that she was advised by JACKSON of the existence of a number of potential alibi witnesses and of his activities on the date and time in question. She further testified, however, that she made no effort to contact and interview any of these witnesses because she concluded that they saw JACKSON too late in the day to provide him with an alibi. (RH-787 et seq.) Further, at the hearing on the Defendant's MOTION FOR POST-CONVICTION RELIEF, he called, among other potential alibi witnesses, John Raymond and Jesse Hudson; both witnesses testified to seeing JACKSON at or around the time of the alleged offenses. (RH-709). After this testimony, Ms Costello was recalled to the witness stand by the State. She then testified that in reviewing her notes from her file she discovered that on June 25, 1975, Assistant State Attorney Jim Appleman, (now State Attorney

Jim Appleman) told her of two witnesses who were prepared to testify that they did not see CARL JACKSON on the date in question. Those witnesses were identified as John Raymond and Gerald Davis. Hence Ms. Costello accepted this representation from Mr. Appleman and made no effort to contact Davis and Raymond to confirm whether or not they could provide her client with his badly needed alibi. (RH-783 et seq.) She further testified that notwithstanding the fact that JACKSON told her he was at the Royal Cafe operated by Jesse Hudson at the time of the alleged crimes, neither she nor an investigator visited the cafe in an effort to corroborate this information. In other words, notwithstanding the fact that Ms. Costello, by her own admission, had no theory of defense, she failed to explore the one possible defense available to her, that being the defense of alibi. This, notwithstanding the fact that her client provided her with the names of witnesses who might help her. Indeed, she accepted without question, the word of counsel for the prosecution that two of those witnesses would not be helpful. It is respectfully submitted that this failure falls below the standard of effective assistance of counsel. The parallels between the case at bar and the Weidner case are too striking to be ignored.

In conclusion, the Appellant CARL JACKSON feels that this Court should grant rehearing and should reconsider the facts of his case, as briefly outlined above, in light of the recent

decision of Weidner v. Wainwright, id.

Respectfully submitted,

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Counsel for CARL JACKSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing has been furnished to DAVID P. GAULDIN, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301 by U. S. Mail this 11th day of August, 1983.

Respectfully submitted,

LARRY G. TURNER

BILL SAIMON

Supreme Court of Florida

FRIDAY, SEPTEMBER 30, 1983

CARL JACKSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

RECEIVED OCT 3 1983

CASE NO. 60,202

Circuit Court No. 75-258-CF
(Bay)

Upon consideration of the Motion for Rehearing filed in the above cause by attorneys for appellant, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON and McDONALD, JJ., concur
EHRLICH, J., dissents

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Tanya Carroll
Deputy Clerk

TC
cc: Hon. Harold Bazzel, Clerk
Hon. W. Fred Turner, Judge

Larry G. Turner, Esquire
Bill Salmon, Esquire
David P. Gauldin, Esquire

EXHIBIT 9

Mandate
Supreme Court of Florida

To the Honorable, the Judges of the Circuit Court in and for Bay County, Florida

WHEREAS, in that certain cause filed in this Court styled:

CARL JACKSON v. STATE OF FLORIDA

RECEIVED NOV 2 1983

Case No. 60,202

Your Case No. 75-258-CF

The attached opinion was rendered on July 28, 1983.

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable James E. Alderman

Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital,

on this 1st day of November 1983.

Clerk of the Supreme Court of Florida.

EXHIBIT 10

STATEMENT OF MAILING

The undersigned, LARRY G. TURNER, having been duly sworn, deposes and states that he is a member of the Bar of the United States Supreme Court, and that APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA has, pursuant to Rule 28.2, Revised Rules of the Supreme Court of the United States, been deposited in a United States Post Office or mail box in Gainesville, Florida, with first-class postage prepaid, properly addressed to the clerk of the United States Supreme Court, within the time allowed for filing, and that to my knowledge the mailing took place on 29 November 1983.

LARRY G. TURNER

SWORN TO AND SUBSCRIBED before me this 29th day of November, 1983.

NOTARY PUBLIC

My Commission Expires:

Notary Public, State Of Florida At Large
My Commission Expires June 9, 1985

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA has been served upon David P. Gauldin, Assistant Attorney General, Department of Legal Affairs, The Capitol, 1502, Tallahassee, Florida 32301 by depositing said document in a United States Post Office or mailbox with first-class postage prepaid, this 29th day of November 1983.

LARRY G. TURNER
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904/375-4460
Counsel of Record